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IN THE

Supreme Court of the United States

October Term, 1960.

No. 402.

JACK ALOFF,

Petitioner,

v.

JAY ASTER, individually and trading as WINGATE CONSTRUCTION CORPORATION, NATIONAL SURETY CORPORATION and THE CROUSE-HINDS CO.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinions of the courts below are reported. *United States ex rel. Jack Aloff v. Jay Aster*, 176 F. Supp. 209 (E. D. Pa. 1959), aff'd, 275 F. 2d 281 (3d Cir. 1960).

JURISDICTION.

The judgment of the Court of Appeals for the Third Circuit sought to be reviewed was dated and entered February 17, 1960. More than 90 days thereafter plaintiff filed additional papers with the Third Circuit (Petition, 7). An order based thereon denying "rehearing" (set forth in the Petition under "Opinion Below") was entered June 16, 1960. On these facts respondents contend that this Court is without jurisdiction under 28 U. S. C. § 2101(c). In addition both the District Court for the Eastern District of Pennsylvania and the Court of Appeals for the Third Circuit decided there was no jurisdiction under the False Claims Act, 31 U. S. C. §§ 231, 232.

QUESTIONS PRESENTED.

1. Does this court have jurisdiction to entertain a petition for certiorari to review a judgment of a court of appeals where the petition is filed well after expiration of the ninety-day jurisdictional period and where during the ninety days petitioner took no action in either the court of appeals or this court to extend the period?

2. Will this court accept for decision bizarre questions not raised in or considered by either of the courts below? [Petitioner's Questions (a) and (b), Petition, 2-3.]

3. Will this court review a question of statutory interpretation on which there is no conflict among any of the circuits and which is so unimportant that it has not arisen before during the seventeen years since enactment of the statute? [Petitioner's Question (c), Petition, 3.]

STATEMENT OF THE CASE.

This is a qui tam action brought by petitioner in the District Court for the Eastern District of Pennsylvania. Petitioner charges that the respondents conspired to defraud the government by installing in an Air Force swimming pool lights which fell short of government contract specifications.

Petitioner did some work on the pool as a subcontractor. Respondent Aster was the general contractor. Respondent National Surety acted as Aster's surety for the proper performance of the contract. Respondent Crouse-Hinds Co. manufactured the lights in question.

Petitioner, who was fired from the job by the general contractor, unsuccessfully litigated the same factual dispute as the one involved in the present federal proceeding in an action against the general contractor for breach of con-

tract, losing both before arbitrators and in the state courts of Pennsylvania. See *Aster v. Jack Aloff Co., Appellant*, 190 Pa. Super. 615, 155 A. 2d 627 (1959).[1] Before starting the present action petitioner brought his claims about the lights to the attention of numerous government officials, among them the government engineer on the job, by distributing copies of a brief prepared in his state court action and otherwise (Petition, 12-13, 15). Notwithstanding petitioner's persistent accusations against the contractor who had fired him and his persistent attempts to get various government officials to side with him in the dispute, the government brought no action of its own against respondents and after petitioner brought this one declined to join with him in prosecuting it.

Respondents, defendants in the district court, moved to dismiss the action. Judge Hastie (sitting in the District Court) granted the motion since both the plain language of the act and its legislative history made it quite clear the court lacked jurisdiction to proceed. *U. S. ex rel. Jack Aloff v. Aster*, 176 F. Supp. 208, 209-10 (E. D. Pa. 1959) (Petition, 11-13). Petitioner then appealed to the Court of Appeals for the Third Circuit, where his contention as to the interpretation of the False Claims Act was again rejected, and the judgment of the district court affirmed. *U. S. ex rel. Jack Aloff v. Aster*, 275 F. 2d 281 (3d Cir. 1960) (Petition, 14-17).

The judgment of the Court of Appeals was entered February 17, 1960, and on March 8, 1960 the mandate of that court was issued and the record returned to the clerk of the district court (Respondents' Exhibit A). Some time thereafter, unbeknown to respondents or their counsel, peti-

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1. In the present case Aloff claims a conspiracy to install bad lights. In the Pennsylvania courts, he claimed he was improperly discharged as a subcontractor because the lights he was asked to install were bad. Needless to say, on the merits of the controversy, it is the position of Respondent, Crouse-Hinds Co., that no better swimming pool lights are available anywhere for any price.

tioner apparently mailed a number of papers to Chief Judge Biggs, one of the panel of judges who had heard his appeal (Petition, Exhibit C, 18-29). According to petitioner, these papers were not sent until May 30, 1960 (Petition, 7), more than ninety days after the judgment now sought to be reviewed. The papers were not served on respondents or their counsel, who were first made aware of their existence when notified of the entry of an order by the Court of Appeals on June 16, 1960, as follows:

> "The papers submitted by appellant, Jack Aloff, are accepted as a petition for rehearing and under the circumstances, as within time. The petition for rehearing is denied."[2]

The Court of Appeals docket also shows that the miscellaneous papers sent to Chief Judge Biggs by petitioner were filed as a "petition for rehearing" on the same date as the order denying a "rehearing" (Respondents' Exhibit A). On September 9, 1960, almost seven months after the Court of Appeals entered judgment for respondents, petitioner filed his petition for writ of certiorari.

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2. This procedure was highly irregular. Cf. The following rules of the Court of Appeals:

"10(4). Conformed copies of all papers filed by any party in any cause and not required by these rules to be served by the clerk shall, at or before the time of filing, be served by the party upon counsel representing each adverse interest. The clerk may insist upon being furnished with proof or acknowledgment of service as a prerequisite to filing any such paper, or he may permit it to be filed and require such proof to be furnished promptly thereafter, as he may in each case think proper.

"33. A petition for rehearing may be filed with the clerk of this court within 15 days after judgment is entered, unless the time is enlarged by order of the court . . . ."

ARGUMENT.

I.

The Petition Must Be Dismissed as Untimely.

This petition for writ of certiorari cannot be entertained. The petition was filed (on September 13, 1960) more than ninety days after the date of the judgment sought to be reviewed (February 17, 1960), in violation of § 2101(c) of the Judicial Code, and this court is therefore without jurisdiction to grant it.

In the petition there is no attempt to justify the late filing. Obviously what the court below did on June 16, 1960, almost four months after judgment was entered and long after the expiration of the ninety-day period for filing of certiorari petitions, could not give petitioner a whole new ninety-day period within which to petition this court for a writ.[3] The court below (apparently *sua sponte*) filed as a "petition for rehearing" papers which petitioner had mailed the Chief Judge, and simultaneously it entered an order denying the so-called "petition." But that action could not generate jurisdiction in this court to review the February 17, 1960 judgment. Jurisdiction to do that expired May 17, 1960. In *Conboy v. First National Bank of Jersey City*, 203 U. S. 141 (1906), the question was whether an appeal to this court from an order of the Court of Ap-

3. Even this court has no power to create a new ninety-day period after the statutory one has expired. 28 U. S. C. § 2101(c) gives only limited power, i.e., power to "extend." The rules of this court recognize that limitation. After the ninety-day period the clerk may not even accept an application for extension. SUPREME COURT RULE 34-2. This limitation on jurisdiction finds its counterpart at the district-circuit level. In *Deena Products Co. v. United Brick and Clay Workers*, 195 F. 2d 612 (6th Cir. 1952), more than thirty days after denial of a new trial motion, the district court reinstated the motion, considered it, and subsequently denied it. It was held that the court of appeals had no jurisdiction to hear an appeal taken within thirty days of the second denial.

peals for the Second Circuit had been made within thirty days after judgment in accordance with the provisions of the Bankruptcy Act. The appellant contended that the appeal was timely because it was taken within thirty days from the denial of a petition for rehearing, even though the petition for rehearing had itself been filed more than thirty days after the judgment sought to be reviewed. This court rejected this contention and dismissed the appeal as untimely, stating at page 145:

> "Appellant might have made his application for rehearing and had it determined within the thirty days, and have had time to take his appeal. But he let the thirty days expire. . . . The right of appeal had then been lost and appellant could not reinvest himself with that right by filing a petition for rehearing.
>
> "The cases cited for appellant, in which it was held that an application for rehearing made before the time for appeal had expired, suspended the running of the period for taking an appeal, are not applicable when that period had already expired."

A contrary rule would mean that even after the entry of judgment and the expiration of the last appeal period a lawsuit would not necessarily be over. The file could never be closed, the client never advised the matter is ended.[4]

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4. Compare *FTC v. Minneapolis-Honeywell Regulators Co.*, 344 U. S. 206, 213 (1952), ". . . the principle that litigation must at some definite point be brought to an end . . . is reflected in the statutes which limit our appellate jurisdiction to those cases where review is sought within a prescribed period." See also *Pfister v. Northern Illinois Finance Corp.*, 317 U. S. 144 (1942), holding that even consideration of petition for reargument during the period for seeking review does not extend that period if the court below concludes that "no grounds for a re-examination of the original order are shown" (at p. 150).

II.
There Are No Special and Important Reasons for Granting the Writ.

The cases cited by petitioner show quite clearly that the extraordinary position he takes has not been taken by any other litigant during the seventeen years the statutory amendment in question has been in effect. It follows that (1) there can be no conflict with the decision of another court of appeals on the same matter, and (2) the question hardly justifies the label "an important question of federal law." SUPREME COURT RULE 19-1(b).

Petitioner's present contention that the Attorney General, not the court, determines the court's jurisdiction under the False Claims Act [his Questions Presented (a) and (b), Petition, 2-3], a contention made for the first time in this court, is supported neither by the statute nor the cases. If Congress had any intention to accomplish such a bizarre result, it is reasonable to assume that something would have been said to that effect in the statute itself.

Finally, the interpretation of the statute by the district and circuit courts was clearly the correct one [Petitioner's Question Presented (c), Petition, 3]. The question is a simple one. It has been considered fully by four able federal judges who agreed. It is neither necessary nor fitting that this court go over the same ground again.

III.
Conclusion.

For the foregoing reasons, the petition should either be dismissed for lack of jurisdiction or denied for lack of merit.

Respectfully submitted,

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GEORGE E. BEECHWOOD,
JOHN V. LOVITT,
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Attorneys for Respondents.

RESPONDENTS' EXHIBIT A.

Docket Entries—U. S. Court of Appeals for the Third Circuit.

July 8, 1959.	Copy of notice of appeal filed.
July 8, 1959.	Record and exhibits filed.
July 8, 1959.	Appearance of Claude O. Lanciano, for appellant, filed.
July 11, 1959.	Appearance of Joseph H. Lieberman for Jay Aster, Ind. and t/a Wingate Construction Company, appellee, filed.
July 17, 1959.	Appearance of George E. Beechwood, Beechwood & Lovitt for National Surety Corporation, filed.
Aug. 5, 1959.	Brief for Appellant and Appendix, filed.
Aug. 17, 1959.	Appearance of F. Hastings Griffin, Jr., for Crouse-Hinds Co., filed.
Aug. 31, 1959.	Brief for Appellees filed.
Nov. 20, 1959.	Argued. Coram: Biggs, Chief Judge; Goodrich and McLaughlin, Circuit Judges.
Feb. 17, 1960.	Opinion of the Court, by McLaughlin, J., filed.
Feb. 17, 1960.	Judgment affirming order of District Court, with costs, filed.
Feb. 24, 1960.	Appellees' Bill of Costs *and* Stipulation that entire printing cost be awarded Crouse-Hinds Co. and not either of the other appellees, filed.
Mar. 8, 1960.	Mandate issued.

Mar. 8, 1960. Record returned to Clerk of District Court.

Mar. 9, 1960. Receipt for record received from Clerk of District Court.

June 16, 1960, Copies of miscellaneous papers sent to Chief Judge Biggs by appellant, received and filed as a petition for rehearing.

June 16, 1960. The following order received and filed—"The papers submitted by appellant, Jack Aloff, are accepted as a petition for rehearing and under the circumstances, as within time. The petition for rehearing is denied."

Aug. 19, 1960. Certified copy of appendix and proceedings to Mr. Jack Aloff.

Sept. 13, 1960. Notice of filing of petition for writ of certiorari, filed.